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Twenty-fifth session

SUMMARY RECORD OF THE 474th MEETING

Held at Headquarters, New York,
on Thursday, 7 May 1992, at 3 p.m.

Chairman: Mr. ABASCAL ZAMORA (Mexico)

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International payments: draft Model Law on International Credit Transfers (continued)

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The meeting was called to order at 3.15 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/46/17; A/CN.9/346, 347 and Add.1 and 367)

Article 17

1. The CHAIRMAN said that it had become clear at the previous meeting that there was no possibility of reaching consensus on eliminating or modifying article 17(2). He therefore suggested that the paragraph should be included in an annex as a provision related to completion of credit transfer and discharge of obligation.

2. Ms. KOSKELO (Observer for Finland) said that she felt it was important to keep article 17(2) in the Model Law; the amendment proposed by the representative of the United States of America would be acceptable.

3. Mr. SCHNEIDER (Germany) said that he had great difficulty with the idea of putting article 17(2) in an annex. In some of the directives of the European Community, important rules appeared in the form of an annex, and that arrangement had not been found helpful. If the paragraph was to be consigned to an annex, he would agree on condition that it was amended as suggested by the representative of the United Kingdom.

4. Mr. SANDOVAL (Chile) said it seemed that there was a majority in favour of deleting paragraph (2). His delegation would accept the paragraph only if it was placed in an annex to the Model Law.

5. Mr. DUCHEK (Austria) said it was clear that there was strong support for both schools of thought. He therefore wished to know what the implications of placing the paragraph in an annex would be. If an invitation to States to consider, in the context of the Model Law, questions relating to the influence of the credit transfer on the underlying transaction was included with paragraph (2), what relationship would the paragraph then have to the rules set out in the Model Law itself?

6. The CHAIRMAN said that the main objection to paragraph (2) had been that it was not relevant to the regulation of credit transfers; there had been no objection to the paragraph itself. By including the provision in an annex, the Commission would be recommending it to Governments for possible inclusion in the Model Law.

7. Mr. HERRMANN (Secretary of the Commission) said that the only model law adopted by the Commission so far had been the UNCITRAL Model Law on International Commercial Arbitration, and it did not have an annex. However, it did have a footnote drawing the attention of States to a certain point. In the Working Group on the New International Economic Order, which was drafting a model law on procurement, there had been a suggestion that certain

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provisions regarding the review of procurement proceedings should be included in an annex because they gave rise to questions of administrative and procedural law and because detailed rules of procedure might not be acceptable to many States. Those objections were similar to some of the objections that had been raised with regard to paragraph (2). The implications of including provisions in an annex would to some extent depend on what introductory wording, if any, was included with the provision; for example, a model clause might be included in a footnote as an additional clause on which parties might wish to agree. However, such a provision would be even more optional than the main text of the Model Law.

8. Mr. DE BOER (Observer for the Netherlands) said that he could support the United States proposal if it satisfied other delegations. However, probably no law provided for an earlier time in relation to credit transfers, apart from agreements between parties.

9. Mr. CHATURVEDI (India) said that his delegation, too, supported the deletion of the United States amendment; it referred to the time of payment, whereas paragraph (2) referred to the discharge of an obligation. If article 17(2) was included in an annex, then for all practical purposes it would be excluded from the Model Law.

10. Mr. FUJISHITA (Japan) said that his delegation was not entirely satisfied with either the United States or the United Kingdom amendments. While the United States amendment dealt with a situation where the applicable law provided for an earlier time of payment, it was not clear what would happen where the applicable law provided for a later time of payment. He saw no convincing reason why the time of completion should be assumed to be the time of discharge in that situation.

11. Mr. BURMAN (United States of America) said that the Commission's objective was to provide a new payment mechanism that would facilitate commerce, and not simply to develop inter-bank transfer rules. The concept of an annex was becoming less attractive to his delegation. In the past, the Chairman had taken the position that language in the Model Law could be changed or removed only if there was a strong majority in favour of such a course. At some earlier meetings, even when there had been a slight majority in favour of an amendment, the Chairman had determined that there was not enough support for a change, and his delegation had conceded some points. The same standard must be applied to the current situation.

12. The CHAIRMAN observed that if the Commission could not reach agreement on paragraph (2), it would not be able to adopt the Model Law at the current session.

13. Mr. GREGORY (United Kingdom) said that including paragraph (2) in an annex would be better than retaining a paragraph in the Model Law on which there was substantial disagreement.

14. Mr. BHALA (United States of America) asked what the effect would be if paragraph (2) was left in the Model Law, either in its existing form or as amended by his delegation, and placed in square brackets.

15. Mr. HERRMANN (Secretary of the Commission) said that square brackets in a final text had no established meaning, but might suggest that the final text was still a draft. It would be better to indicate that there had been no consensus on the paragraph, or to include the paragraph in a footnote marked by an asterisk.

16. Mr. ALVAREZ (Uruguay) suggested that paragraph (2) should be left in square brackets. The Commission could then proceed with its other work while conducting informal consultations in order to find a solution to the problems posed by that paragraph.

17. Mr. BURMAN (United States of America) welcomed that suggestion, noting that, if the Commission opted for square brackets, the provision would have to be accompanied by a statement indicating that it had not been agreed upon by the Commission.

18. Mr. EWORE (Observer for Gabon) said that the second sentence of paragraph (1) meant that the beneficiary's bank was obliged to pay the beneficiary the amount of the payment order. The Model Law needed a provision that would deal with the discharge of that obligation, and paragraph (2) met the case. Including it in an annex would not be useful. However, revising the last words of the paragraph, following the word "extent", to read "that it pays the amount indicated in the payment order" would emphasize the discharge of the originator's obligation to the beneficiary.

19. Mr. GREGORY (United Kingdom) felt that square brackets were not the right solution and agreed with the Secretary of the Commission that placing the paragraph in an annex would have the undesirable effect of making it more optional than the other provisions. However, the annex might contain an indication of where the paragraph would have been placed in the body of the Model Law.

20. Mr. DUCHEK (Austria) shared the view of the representative of the United Kingdom. The use of square brackets with or without a footnote would constitute a precedent, and not necessarily a desirable one, for the Commission.

21. Mr. EL-SHARKAWY (Egypt) said that all members conceded that the text should be optional. The Commission should not be concerned with following precedents as the Model Law was only the second such instrument it had drafted. There were many ways to show that the text was optional: in addition to those already suggested, the paragraph might be inserted under the title "Optional text".

22. Mr. BHALA (United States of America) said that the idea of putting the paragraph in an annex to the Model Law and saying that it was optional would be of no practical help, as indeed the whole Model Law was optional. Footnotes had been used in other instruments, such as the one relating to the Bank for International Settlements, to show that no consensus had been reached. In any event, his delegation felt that square brackets, a footnote or both must be used.

23. The CHAIRMAN said that many delegations were opposed to the use of square brackets, which had the disadvantage of drawing attention to the lack of agreement.

24. Mr. OLSZOWKA (Poland) suggested that an ad hoc neogtiating group should be established to find a compromise solution. Otherwise, his delegation would be in favour of retaining the paragraph in the text of the Model Law, perhaps in the manner outlined by the United States delegation.

25. The CHAIRMAN said that paragraph (2) as it stood was already the result of negotiations, and yet it continued to meet with strong opposition. There was resistance also to the footnote idea. As the only delegation opposed to the idea of placing the paragraph in an annex seemed to be the United States of America, he appealed to that delegation to display solidarity by accepting that idea.

26. Mr. BURMAN (United States of America) said that his delegation still thought that the worst option would be to place the paragraph in a separate document such as an annex. He therefore suggested that the entire paragraph should be included in a footnote to article 17. In that way, it would not be separated from the rest of the text.

27. Mr. KOMAROV (Russian Federation) said that the United States proposal appeared to meet his delegation's concern that the paragraph should be retained.

28. Mr. GREGORY (United Kingdom) said that his delegation, too, could accept the inclusion of the entire paragraph in a footnote. However, the Commission should indicate that there had been consensus on the placement of the paragraph, rather than that there had been no consensus on the text.

29. Mr. EL-SHARKAWY (Egypt) said that his delegation could also support the new proposal by the representative of the United States.

30. Mr. LIM (Singapore) said that his delegation also supported the proposal. Many countries had added provisions to the UNCITRAL Model Law on the International Commercial Arbitration, and there was no doubt that countries might do the same with the current text.

31. Mr. BISCHOFF (Observer for Switzerland) wondered whether the footnotes in the Model Law ought not to have the same function throughout the instrument. The footnote appended to article 1 served to define the scope of the law and reflected a consensus, while the footnote proposed for article 17 would point up a disagreement.

32. Mr. HERRMANN (Secretary of the Commission) said that the Model Law, once adopted, would be considered by legislators, who would then decide whether to model their own legislation after it. The distinction between the two kinds of footnote could be made clear by different wordings.

33. Mr. CHATURVEDI (India) said that the fact that there had been no consensus on the paragraph must be noted; otherwise, the footnote would not be distinct from the text.

Article 18

34. Mr. EL-SHARKAWY (Egypt) pointed out that, although the Model Law was intended to prevent any conflict of laws, article 18 was in fact entitled "Conflict of laws". The article should be deleted, as it was not appropriate in the Model Law.

35. The CHAIRMAN said that the Working Group had considered the fact that an international credit transfer by definition transited through various countries. Any one of those countries might not have adopted the Model Law, or might have adopted it only in part. Moreover, the Model Law itself might have lacunae that would lead to a conflict of national laws.

36. Mr. ABOUL-ENEIN (Observer, Cairo Regional Centre for International Commercial Arbitration) said that the issues raised by the conflict of laws governing international credit transfers were very complex. One of the difficulties in relation to article 18 was its ambiguity. In his view, no single conflicts rule would be appropriate for both electronic and paper-based transfers; accordingly, he thought that article 18 should be deleted. He also believed, however, that the parties to a transfer should have the freedom to choose the legal regime applicable to their transactions.

37. Mr. RENGER (Germany) said that the entire article should be deleted. For his country, as for other members of the European Economic Community, the article would raise more problems than it would solve, particularly with regard to the Rome Convention on the Law applicable to Contractual Obligations between the member States of the European Communities.

38. Mr. DE BOER (Observer for the Netherlands) said that, in principle, he had no objection to the adoption of rules on private international law. However, as the proposed text did not have a high degree of refinement, he wondered whether it might not constitute an obstacle to the further development of international law.

39. Mr. PELICHET (Observer, The Hague Conference on International Private Law) said that his organization had submitted written observations to the Commission at its previous session suggesting that article 18 should be deleted. The Hague Conference did not believe that a single conflicts rule could apply to both paper-based and electronic transfers. Moreover, the Model Law was based on a unitary concept - as evidenced in particular by the provisions on the revocation of payment orders and the duty to refund - while under article 18, a transfer carried out in different countries was viewed as having various segments. If any of those countries had not adopted the Model Law, the compromise on which it was based would collapse.

40. Article 18 was modelled on Section 4A-507 of the United States Uniform Commercial Code, which had been adopted in an inter-American context. While the conflicts rule reflected in that provision might function in an inter-American context, it would not be appropriate for European countries. Even in the United States the rule was not applied: where transfers were effected through electronic transfer networks, such as FedWire or the Clearing House Interbank Payments Systems (CHIPS), the conflicts rules laid down in Section 4A-507 were set aside in favour of unitary-rule systems.

41. Moreover, merely deleting article 18 would not solve the problem in its entirety. The Hague Conference had put the issue on its agenda for future discussion. If the Commission decided to delete the article, he recommended that efforts should be undertaken, in collaboration with banks, to develop a unitary rule which could function in the context of electronic transfers.

42. Mr. SAFARIAN NEMAT-ABAD (Islamic Republic of Iran) said that, while his delegation had no difficulties with article 18 as a whole, it was unclear as to the meaning of the term "receiving banks" in paragraph (1), since each intermediary bank which took part in an international transfer was considered to be a receiving bank.

43. The CHAIRMAN said that paragraph (1) established a rule for each payment order, rather than for the entire transfer. All the operations required to carry out a payment order took place in the receiving bank, there being one receiving bank for each segment of the transfer.

44. Mr. EWORE (Observer for Gabon) said that the issue under discussion was highly sensitive. The arguments in favour of retaining paragraph (1) were legitimate, in view of the general lack of conflicts rules at the international level. The paragraph, however, raised some dangers. For example, if the parties to a transfer had the option of choosing the applicable law, it was to be expected that they would choose those national provisions with which they were most familiar. He therefore suggested that there should be an additional provision that would take into account both those States which had ratified the Model Law and those which had not, thereby ensuring that the Model Law would be applied at least by those countries which had ratified it.

45. Mr. FUJISHITA (Japan) said that he supported the deletion of the article.

46. Mr. OLSZOWKA (Poland) said that the article should be retained on the grounds that even an imperfect conflicts rule was better than none at all. While it was true that States which were already parties to conventions on conflict of laws would find it difficult to apply the provisions of the Model Law, ratification of such instruments was far from universal.

47. Despite its support for the article, his delegation felt that the expression "having different rules of law" in paragraph (3) (a) was ambiguous and might lead to conflicts.

48. Mrs. AUGIER (France) said that her delegation shared the views expressed by the observer for the Hague Conference and believed that, for a number of legal and practical reasons, the article should be deleted. She also supported the proposal to refer the question to a group of experts for review. It was unclear how a system based on article 18 could ensure certainty, which was the main purpose of the Model Law. For example, with regard to the application of article 13, the organization of a series of refund transfers could be disrupted if one party was able to invoke a law prohibiting such reimbursements.

49. Mr. BURMAN (United States of America) said that while article 18 was imperfect, its provisions, particularly paragraph (1), were supported by a number of United States commercial parties. The first sentence of that paragraph was probably acceptable to most delegations; it was intended to resolve situations in which commercial parties chose an applicable law which was not honoured by the courts owing to the lack of a statutory provision. The second sentence was more problematic. In the absence of a convention or some other means of binding countries to a common rule, the question raised by the representative of France could not be answered.

50. Mr. BHALA (United States of America), replying to the question raised by the observer for the Hague Conference, said that the FedWire rules had been enacted in United States law in what was known as Regulation J, which incorporated Article 4A of the Uniform Commercial Code. Consequently, the FedWire rules could not be cited as an argument against the retention of article 18, particularly as 37 American States had adopted Article 4A without amendment to date.

51. It was essential to consider the two parts of paragraph (1) separately. The first sentence was important because it allowed parties to agree that a single law should govern their transfer. The value of the second sentence was that it provided an element of certainty with regard to each aspect of a credit transfer. The provision stipulating that the law of the receiving bank would apply unless otherwise agreed was also useful because it dealt with the propensity of lawyers to seek out the most advantageous jurisdiction and prevented the unwarranted extraterritorial application of the law of a particular State.

52. The CHAIRMAN said that one of the major considerations borne in mind by the Working Group when adopting article 18 had been the existence of a complete lacuna in the area of conflict of laws. The article was thus intended as a first step in the drawing up of rules to remedy that situation.

53. Ms. KOSKELO (Observer for Finland) said that while there was general agreement on the need for provisions to govern conflict of laws, article 18 as currently drafted did not offer the best solution. The Working Group had not analysed the question in sufficient depth, and it was unlikely that States would be willing to adopt rules with which they did not feel comfortable. The provisions would not succeed in achieving harmonization in the field but might have the opposite effect by precluding the efforts of the Hague Conference to draw up its own rules on the subject. It would be preferable to allow the Hague Conference to take up the matter and give it thorough consideration. Article 18 should therefore be deleted.

54. The CHAIRMAN asked the observer for the Hague Conference if he could say when the Conference intended to start work on the question and how long its work might take.

55. Mr. PELICHET (Observer, The Hague Conference on Private International Law) said that a decision might be taken in June 1992 to start work immediately by submitting a questionnaire to banks, with a view to finding an appropriate basis for a solution. The results could then be submitted to the seventeenth session of the Conference in 1993 and, if the outlook was positive, the matter could be included on the agenda for the following session in 1996, when a convention could be drawn up and adopted.

56. Mr. JANSSON (Sweden) said that he fully endorsed the arguments put forward by the observer for the Hague Conference and therefore favoured the deletion of article 18.

57. Mr. DUCHEK (Austria) acknowledged that it was difficult to draft appropriate rules when several different jurisdictions were involved; nevertheless article 18(1) would not function properly in its current form. The aim of the article should be to identify a single law which would govern the whole operation.

58. There were also a number of technical deficiencies in paragraph (1). For example, it was not clear whether the reference to rights and obligations arising out of a payment order concerned the whole of a credit transfer; likewise it was unclear whether the obligation of the beneficiary's bank to the beneficiary after completion of the transfer was included. In addition, the terms "parties" and "agreement" were somewhat vague. In the light of all those considerations, he favoured the deletion of article 18.

59. Mr. VASSEUR (Observer, Banking Federation of the European Community) said that his organization had conducted a survey among its 17 member associations concerning rulings by the courts in their country during the last 30 years on the question of conflict of laws with regard to international credit

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transfers. None of the member associations had been able to cite a single court decision. He therefore felt that the matter was of no great urgency.

60. The Banking Federation was opposed to article 18 in its existing form but was anxious to cooperate with the Hague Conference in giving serious and wide-ranging consideration to the question. In addition, the Banking Federation did not accept the notion of a credit transfer as a series of separate operations. It therefore agreed with the Hague Conference that efforts should be concentrated on devising a single law which considered credit transfers as a single operation. With that in view, the most appropriate provisions would be those of the law of the place where the beneficiary's bank was established.

The meeting rose at 5.55 p.m.